No. 20426

In the

United States Court of Appeals

For the Ninth Circuit

THOMAS T. COHEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Arizona

Reply Brief for Appellant

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JURISDICTIONAL STATEMENT

The appellant, Thomas T. Cohen, was found guilty on March 17, 1965, by a jury, of ten counts of mail fraud, Sec. 1341, Title 18 U.S.C., and one count of using a fictitious name in support of the scheme to defraud, Sec. 1342, Title 18, U.S.C. Timely motions for a judgment of acquittal and for a new trial were filed. Same were denied on May 17, 1965, at which time the Court sentenced the appellant to two years each on Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 (count 8 having been dismissed), the sentences to run concurrently. The Court also ordered the defendant to be eligible for parole pursuant to Title 18, U.S. Code, Section 4208A (2).

The matter is before this Court pursuant to Title 28, U.S. Code, Section 1291.

REPLY TO APPELLEE'S ARGUMENT THAT DISMISSAL OF THE FIRST INDICTMENT DOES NOT BAR A SECOND INDICTMENT FOR THE SAME OFFENSE.

The appellee makes the point that an appeal from the order denying the motion to dismiss on the second indictment was not perfected (pages 10 and 11, Appellee's Brief). This is, of course, so. Although a notice of appeal was filed; it was immediately determined that a denial of a motion to dismiss an indictment was and is not a "final decision" within the statute conferring jurisdiction of appeals from final decisions of Federal District courts upon the Court of Appeals. Therefore, the denial to dismiss an indictment is not reviewable until there has been a judgment. *Atlantic Fisherman's Union v. U. S.*, 197 F.2d 519; *Conway v. U. S.*, 142 F.2d 202; *Tudor v. U. S.*, 142 F.2d 6.

The grounding basis of the appellee's opposition to the opening brief of the appellant is that the order dismissing the indictment, because every sense of the right to speedy trial pursuant to the Sixth Amendment was violated (T. of T., July 28, 1964, T. of R. Vol. 1, pages 72 and 73), should never have been granted in the first place (Appellee's Brief, pages 11-14). The Government could well have appealed that order directly to the Supreme Court, 18 U.S.C. Section 3731. This the Government chose not to do. Since their appeal from that order has been precluded by the passage of time, the appellee now tries for its second bite out of the apple by attempting to make the issue whether or not Judge Mathes' first order dismissing the indictment was initially correct. This is attempting to argue an issue not properly before this Court. Nevertheless, we have chosen to reply to some of the authorities in the Government's brief. The appellee relies upon *United States v. Ewell and Dennis,* ..... U.S. ....., No. 29 Oct. Term 1965, (February 23, 1966), 34 U.S. Law Week 4154. Once again, the Government is

arguing whether or not the initial dismissal was proper. In the *Ewell* case, supra, the indictments of Ewell and Dennis were dismissed for being defective by the District Court on January 13 and April 13, 1964, respectively. Ewell and Dennis *were immediately re-arrested* (emphasis ours) on new complaints and reindicted on March 26, 1964 and June 15, 1964, respectively. Therefore, the *Ewell* case, supra, is not applicable because it was a direct appeal of the order dismissing the indictments for lack of speedy trial, and furthermore, the defendants were immediately (or at any rate within sixty days) advised of the new charges against them. In the case at bar it was more than eight months before the appellant was notified of the charges against him. Furthermore, Ewell and Dennis had known for several years of the charges against them as they had pleaded guilty to the initial charges.

The appellee makes the point that the appellant did not complain that the delay prejudiced him in any way (Appellee's Brief, page 13). We maintain that although the law may be somewhat unclear as to whether under the Sixth Amendment the Government had the burden of showing in the District Court that the defendant was not prejudiced by a delay; our reading of *Petition of Provoo*, 17 F.R.D. 183, 203 (D. Md.), affirmed 350 U.S. 857; *Taylor v. U. S.*, 238 F.2d 259 (C.A.D.C.); *United States v. Lustman*, 285 F.2d 475, 478 (C.A. 2), cert. den. 358 U.S. 880, and *Williams v United States*, 250 F.2d 19, 21 (C.A.D.C.), indicates that the Government bears this burden. In any event, the Government made no such showing, and it is clear that the trial court found as a matter of fact that there was prejudice to the defendant which denied him his right to a speedy trial.

The defendant is prejudiced by the harassment of a second criminal proceeding against him and the accompanying